STATE OF MICHIGAN

COURT OF APPEALS

LAKE STATES INSURANCE COMPANY, n/k/a HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

Plaintiff-Appellant,

v

MASON INSURANCE AGENCY, INC., and PETER HANOVER,

Defendants-Appellees.

UNPUBLISHED
February 22, 2007

No. 271666
Oakland Circuit Court
LC No. 2005-070131-CK

Before: O'Connell, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants summary disposition on the basis of res judicata, MCR 2.116(C)(7). We affirm.

This case arose after plaintiff's corporate successor, Harleysville Lake States Insurance Company, failed to recover in a previous lawsuit against defendants for breach of contract. According to Harleysville, defendants failed to include an uninsurable driver with a poor driving record on his employer's car insurance application. The application was sent to Harleysville's predecessor, plaintiff Lake States, but Lake States changed its name to Harleysville before it issued car insurance to the employer. Nearly a year after the insurance policy was issued, the employee drove his employer's car into a wall, rendering his sister a paraplegic and leaving Harleysville liable for millions of dollars in damages. Harleysville sued defendants in contract for their failure to list the employee as a driver, but erroneously attached to its complaint an updated, and largely irrelevant, contract between Harleysville and defendant Mason Insurance Agency. Defendants later raised the issue at trial that the attached contract was made after the alleged failure to inform Lake States, and that Harleysville failed to present persuasive evidence that it was even the successive entity entitled to enforce the contract with Lake States. The jury agreed, and we affirmed the no-cause verdict on appeal. Plaintiff then brought this suit in its original name, and claimed that defendants were judicially estopped from asserting that Harleysville and Lake States are different entities for res judicata purposes. The trial court disagreed and dismissed the suit.

On appeal, plaintiff argues that the trial court erred by allowing defendants to assert res judicata as a defense against the contract action. We disagree. We review de novo a trial court's

decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The doctrine of res judicata generally bars a party from reinitiating a lawsuit that has already been adjudicated. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The doctrine encourages finality and prevents abuse of the legal system. *Id*. According to *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10-11; 672 NW2d 351 (2003), res judicata applies if:

> (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. Michigan law defines res judicata broadly to bar litigation in the second action not only of those claims actually litigated in the first action, but claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated but did not. [Citations omitted.]

Plaintiff's successor in interest, Harleysville, could have established its right to enforce the contract against defendants on plaintiff's behalf, and it initially presented the same claims of defendants' liability on the basis of the same documentary evidence. Harleysville could have presented the relevant contract to the jury, but its own initial oversight and later failure to lay an evidentiary foundation for the document prevented its publication to the jury during deliberations. The case went to the jury without the relevant contract, and the jury found that Harleysville failed to prove a contractual obligation during the relevant time period. The case at bar is a nearly identical contract action, and the only remarkable differences are the name used by the plaintiff to assert the claim and the contract offered to support the claimed breach. Therefore, each of the elements of res judicata has been met.

Plaintiff does not contend that defendants actually failed to establish any of these elements, but instead argues that they should be judicially estopped from asserting that Harleysville and plaintiff Lake States are essentially the same parties. Plaintiff argues that defendants successfully asserted a lack of privity between Harleysville and plaintiff Lake States in the first case, so defendants may not now take the position that the two names represented the same entity for res judicata purposes. However, judicial estoppel only bars defendants from asserting a position in this suit if it succeeded in presenting a "wholly inconsistent" position in the original suit. *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). Defendants never unequivocally asserted or attempted to prove positively that Harleysville and Lake States were separate entities. Instead, they merely challenged the evidentiary foundation for the Lake States documentation and left Harleysville to prove its privity with Lake States. Defendants also objected when Harleysville tried to introduce, tardily, the Lake States contract and suggested to the jury that Harleysville failed to present any persuasive evidence that it had an enforceable interest in the relevant contract with plaintiff Lake States. During closing arguments, defense counsel even expressed a lack of definitive knowledge either way about the matter, and repeatedly referred the jury to the dearth of proof and plaintiff's burden. In other words, the only position defendants took in the first action was that plaintiff failed to *prove* its enforceable interest in a relevant contract, and that position is identical to their position in the present action. Therefore, the trial court did not err by rejecting plaintiff's judicial estoppel argument.

Anticipating defendants' response, plaintiff also argues that the trial court should have applied judicial estoppel to defendants' denial that there was a written agency contract in place when they submitted the flawed insurance application. Not only does this argument fail to relieve plaintiff of res judicata strictures, it does not accord with the facts. Defendants are not absolutely conceding that a written contract existed when the incomplete application was submitted, and if they made that concession it would not cause any inequity to plaintiff. In a second trial, defendants would likely leave plaintiff to prove the existence and enforceability of the contract, so their position in this second, improper, action does not differ at all from their position in the first action. Plaintiff's successor in interest could have presented all of its claims and documentary evidence in the first trial, but simply failed to prove its case persuasively. Therefore, res judicata bars this suit. *Peterson Novelties, Inc*, *supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Christopher M. Murray